KETUA PENGARAH INSOLVENSI A

v.

DATO' DR CHEN LIP KEONG & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
MAH WENG KWAI JC
[BANKRUPTCY NO: D-29-5236-1992]
27 OCTOBER 2010

CIVIL PROCEDURE: *Official assignee - Sanction - Sanction granted for bankrupt to pursue suit against applicants - Setting aside - Appeal against - Failure of bankrupt to comply with conditions stipulated - Interests of applicants not safeguarded - Whether official assignee must be fully satisfied of the grounds of the application before exercising his discretion to grant sanction - Bankruptcy Act 1967, ss. 38(1)(a), 71, 86* C D

The first and third applicants commenced an action (the D1 suit) against one Dato' Mohd Fathi Haji Ahmad (the bankrupt) for the sum of RM26 million and 94.5 million respectively together with interests in respect of some shares arising from a shares sale and purchase agreement. The bankrupt commenced an action against the applicants (the D3 suit) for damages in respect of the said shares. The D1 and D3 suits were consolidated and were pending trial. Meanwhile, adjudication and receiving orders (AO/RO) were obtained by the Judgment Creditor (JC) for the judgment sum of RM9,905,514.54 against the bankrupt. Pending the appeal by the bankrupt against the AO/RO, the D1 and D3 suits were stayed to enable the bankrupt to obtain the requisite sanction of the official assignee under s. 38(1)(a) of the Bankruptcy Act 1967 (BA) to proceed with the D3 suit. Subsequently, the official assignee gave the sanction to the bankrupt to pursue his D3 suit against all the applicants. The applicants wrote to the official assignee and inquired whether the estate of the bankrupt was prepared to pay the sum of RM300,000 as security for costs. The official assignee replied that the estate of the bankrupt did not have the funds to pay for the security for costs in the sum as requested and was not prepared to give any undertaking as to costs. The applicants being dissatisfied with the sanction given by the official assignee filed their respective applications under s. 86 of the BA to set aside the official assignee's sanction with costs. The Senior Assistant Registrar (SAR) allowed the applicants' E F G H I

A applications to set aside the official assignee's sanction. Dissatisfied with the SAR's decision, the official assignee appealed to the judge in chambers against the said order.

Held (dismissing the appeal with costs):

B **(1)** Upon the grant of the AO/RO, the official assignee was vested with the property of the bankrupt and has conduct of the financial affairs of the bankrupt and the administration of his estate (s. 71 of the BA). The official assignee as the administrator and receiver of the bankrupt's estate ought to C have full knowledge of the bankrupt's financial affairs. The official assignee must be fully satisfied of the grounds of the application before exercising his discretion to grant the sanction. The official assignee must be in the position to give his reasons for granting the sanction as his decision could be D challenged by the bankrupt, creditor and/or an aggrieved person (s. 86 of the BA). (paras 14.1 & 14.2)

(2) Although the official assignee was correct to hold that the bankrupt had an interest in the shares, the official assignee E had failed to give his reasons to support his decision to grant the sanction. The official assignee did not carry out an in depth study of the merits of the D3 suit to satisfy himself on the chances of success in the trial of the D3 suit or to seek legal opinion on the strength of the case. Having made a F decision which was quasi-judicial in nature it would be incumbent upon the official assignee to give reasons to support his decision and to inform a party who was not only interested in but aggrieved by the decision. The official assignee's submission that the basis for granting the sanction was not an G issue and 'could not be questioned by the applicants' was not accepted. (paras 14.5, 14.7 & 14.9)

(3) The official assignee was not in a position to determine meaningfully whether the estate of the bankrupt would really H benefit from the continuance of the trial of the D3 suit. The estate, not having the funds to furnish RM300,000 as security for costs, would not be in a position to settle the judgment debt in the sum of RM9,905,514.54 to the JC. The official assignee had not considered at all the position of the D1 suit I in the event the D3 suit was proceeded with, as the two

cases have been consolidated. The official assignee had failed and/or neglected to address the fears of the applicants in not being able to recover the costs in the D3 suit, in the event the suit was dismissed against them. Further, the conditions set out by the official assignee for the bankrupt to comply had not been adequately met. In view of the bankrupt's failure to comply fully with the conditions stipulated by the official assignee, it was clear that the official assignee should not have granted the sanction to the bankrupt as the interest of the applicants had not been safeguarded. (paras 14.11 & 15)

(4) The official assignee's decision to grant the sanction must be on an informed basis and not made purely as an administrative decision. The official assignee had failed to show to the applicants that the estate of the bankrupt would have the funds to meet the costs of the D3 suit which had been pending for the last 21 years. There was no basis for the official assignee to say that there was no risk that the estate of the bankrupt could not pay the costs. (para 17)

Case(s) referred to:
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 71

For the appellant - Rozaida Othman (Sakina Che Sab with her); FCs
For the respondent - Felix Raj; M/s Shaikh David Raj

Reported by Suhainah Wahiduddin

JUDGMENT

Mah Weng Kwai JC:

[1] In 1989, the 1st and 3rd applicants amongst others commenced an action against Dato' Mohd Fathi bin Hj Ahmad, (the bankrupt) *vide* Kuala Lumpur High Court Civil Suit No: D1-22-1101-1989 (the D1 suit) for the sum of RM26 million and RM94.5 million respectively together with interests in respect of 11,979,333 ordinary shares (the shares) in First Malaysia Finance Berhad (First Malaysia) arising from a Shares Sale and Purchase Agreement dated 28 December 1984.

[2] In 1990 the bankrupt commenced an action against all the applicants *vide* Kuala Lumpur High Court Civil Suit No: D3-21-1218-1990 (the D3 suit) for damages in respect of the Shares in First Malaysia. The Shares in First Malaysia are owned by MRSB Sdn Bhd and FUSB Sdn Bhd, which are not parties to the two suits.

[3] The bankrupt claimed to be the beneficial owner of the Shares in First Malaysia. First Malaysia was placed under receivership in early 1980. Its assets and liabilities were taken over by the then Arab-Malaysian Finance Berhad (AMFB). The Shares Sale and Purchase Agreement entered into between the Receiver and Manager of First Malaysia and AMFB was duly approved by an order of the High Court dated 24 December 1990.

[4] The D1 and D3 suits were consolidated and were pending trial as at February 2006. On 20 November 2006, adjudication and receiving orders (AO/RO) were obtained by the judgment creditor, Standard Chartered Bank (Malaysia) Bhd (JC) for the judgment sum of RM9,905,514.54 against the bankrupt.

[5] The bankrupt appealed against the AO/RO to the Court of Appeal but the appeal was dismissed. An application for leave to the Federal Court was also dismissed.

[6] Pending the appeal by the bankrupt against the AO/RO, the D1 and D3 Suits were stayed to enable the bankrupt to obtain the requisite sanction of the official assignee under s. 38(1)(a) of the Bankruptcy Act 1967 (BA) to proceed with the D3 suit. The bankrupt applied to the official assignee for his sanction on 29 October 2008. The D1 and D3 suits have not been disposed off till today.

[7] By letter dated 4 December 2008, the official assignee informed the bankrupt that the sanction would be given subject to the following *inter alia* conditions:

(a) The Bankrupt must furnish a competent guarantor who must sign a letter of undertaking and security bond at the Kuala Lumpur Insolvency Department. The guarantor is to deposit RM3,000 by way of bank draft/postal order.

(b) The guarantor must give an undertaking that any costs, payment or expenses arising in consequence of the case should be borne by the guarantor and the guarantor will not make any claim on the Director General of Insolvency Department or estate of the Bankrupt.

(c) The Director General of Insolvency Department will not be responsible for any failure, loss or any costs incurred against any party in the proceedings.

(d) The solicitor representing you must update the Director General of Insolvency Department with regards to the status of the case in writing.

The conditional approval of the sanction would lapse if the Bankrupt failed to comply with the conditions stipulated within 21 days from 4 December 2008, the date of the letter.

[8] On 23 December 2008, the official assignee gave the sanction to the bankrupt to pursue his D3 suit against all the applicants (encl. 89 - exh. 'RO 3'). On 6 February 2009, the applicants requested the official assignee to furnish them with his grounds for giving the sanction to the bankrupt as well as to inform them of whether the guarantor had paid the deposit sum as required. The official assignee did not respond to this request.

[9] However on 23 February 2009, the official assignee informed the applicants that "Dalam hal ini kami berpendapat bahawa si bankrap mempunyai kepentingan terhadap saham syarikat tersebut. Oleh itu Ketua Pengarah Insolvensi Malaysia telah melaksanakan kuasanya secara budibicara dengan memberi sanksi kepada si bankrap. Sekiranya tuan ingin mendapatkan dokumen-dokumen sanksi tersebut pihak tuan bolehlah mendapatkannya sendiri daripada si bankrap."

[10] Following this, the applicants on 19 November 2009 wrote to the official assignee and inquired whether the estate of the bankrupt was prepared to pay the sum of RM300,000 as security for costs. On 3 December 2009 the official assignee replied that the estate of the bankrupt did not have the funds to pay for the security for costs in the sum as requested and was not prepared to give any undertaking as to costs.

[11] The applicants being dissatisfied with the sanction given by the official assignee filed their respective applications on 25 January 2010 *vide* encls. 84, 86 and 88 under s. 86 of the BA to set aside the official assignee's sanction with costs.

[12] On 29 June 2010, the learned Senior Assistant Registrar (SAR) allowed the applicants' applications to set aside the official assignee's sanction. Being dissatisfied with the learned SAR's decision, the official assignee appealed to the judge in chambers against the said order on 8 July 2010.

A **Decision Of The Court**

[13] On hearing the appeal on 22 September 2010 and after considering the oral and written submissions of the official receiver and counsel for the applicants, the court dismissed the appeal with
B costs.

[14] Reasons For The Decision

14.1. Upon the grant of the AO/RO, the official assignee is vested with the property of the bankrupt and has
C conduct of the financial affairs of the bankrupt and the administration of his estate (see s. 71 of the BA).

14.2. The official assignee as the administrator and receiver of the bankrupt's estate ought to have full knowledge of the
D bankrupt's financial affairs. The official assignee must be fully satisfied of the grounds of the application before exercising his discretion to grant the sanction. The official assignee must be in the position to give his reasons for granting the sanction as his decision can be challenged
E by the bankrupt, creditor and/or an aggrieved person (see s. 86 of the BA).

14.3. In this case, the applicants have the locus to challenge the decision of the official assignee as they are aggrieved
F persons.

14.4. The applicants contend that the official assignee ought not to have granted the sanction on the following grounds:

G (a) that the official assignee did not fully appreciate the facts in the D3 suit and that the relief sought by the bankrupt in the D3 suit will be ineffectual and futile in view of the several changes in the ownership of the shares in first Malaysia and that the shares are
H of little or no value,

(b) that the estate of the bankrupt is not in the position to pay the costs of the D3 suit which has been pending for the last 21 years,

I (c) that the estate of the bankrupt will be no position to satisfy the claims of the 1st and 3rd applicants in the D1 suit in the event the bankrupt is held liable, and

(d) that the conditions set out in the official assignee's letter of 4 December 2008 have not been properly and fully met.

14.5. I am of the view that although the official assignee was correct to hold that the bankrupt has an interest in the shares, the official assignee had failed to give his reasons to support his decision to grant the sanction. It was insufficient for the official assignee to state in his letter in reply to the applicants dated 23 February 2009 that the bankrupt had an interest in the shares and that it was his discretion to grant the sanction without saying more.

14.6. I am of the view however, that it is incorrect for the applicants to contend that the bankrupt did not possess an interest in the shares merely because ownership of the shares had changed hands several times and that the shares are of little or no value. The applicants themselves had conceded that the bankrupt had a beneficial interest in the shares. What this means in simple terms, is that in the event the bankrupt is successful in the D3 suit the judgment sum would be paid to the legal owners of the shares namely, MRSB Sdn Bhd and FUSB Sdn Bhd and not to the estate of the bankrupt. Whether the estate of the bankrupt will be able to recover the money on the basis of the bankrupt's beneficial interest will be another matter to be resolved at another time.

14.7. From the facts, it is obvious that the official assignee did not carry out an indepth study of the merits of the D3 suit to satisfy himself on the chances of success in the trial of the D3 suit or to seek legal opinion on the strength of the case.

14.8. Without satisfying himself on the merits of the case, it would be insufficient for the official assignee to merely declare that the bankrupt possessed an interest in the shares and thereby grant his sanction. In any other case, surely the official assignee would not grant his sanction if he knew the continued hearing of the case would be doomed to failure.

14.9. For reasons stated above, I am thus unable to agree with the contention of the official assignee as stated in the written submission of counsel, that the official assignee was not obliged to "assess the fact and merit of the application of sanction by the bankrupt and no duty of DGI to inform and give the justification of granting the sanction to the bankrupt pursuant to Bankruptcy Act 1967". Having made a decision which is quasi-judicial in nature it would be incumbent upon the official assignee to give reasons to support his decision and to inform a party who is not only interested in but aggrieved by the decision. I cannot agree with the official assignee's submission that the basis for granting the sanction is not an issue and "cannot be questioned by the applicants".

14.10. On 19 November 2009, the applicants wrote to the official assignee (encl. 183 - p. 181) to inquire whether the estate of the bankrupt would be willing and able to pay RM300,000 as security for costs. The official assignee replied on 3 December 2009 informing the applicants that the estate did not have the funds to do so.

14.11. I am of the view that the official assignee ought not to have granted the sanction to the bankrupt for the following *inter alia* reasons:

(a) the official assignee having failed to carry out an indepth study into the merits of the D3 suit or to take legal opinion on it was not in the position to determine meaningfully whether the estate of the bankrupt would really benefit from the continuance of the trial of the D3 suit.

(b) the estate, not having the funds to furnish RM300,000 as security for costs, will not be in a position to settle the judgment debt in the sum of RM9,905,514.54 to the JC.

(c) it appears that the official assignee did not consider at all the position of the D1 suit in the event the D3 suit is proceeded with, as the two cases have been consolidated.

(d) the official assignee has failed and/or neglected to address the fears of the applicants in not being able to recover the costs in the D3 suit in the event the suit is dismissed against them, and

(e) importantly, the conditions set out by the official assignee for the bankrupt to comply in his letter of 4 December 2008 have not been adequately met or at all within the period of 21 days from the date of the letter namely:

(i) Bankrupt to secure a competent guarantor to give letter of undertaking

A letter of undertaking by a guarantor was purportedly given by one Ahmad Sakhee bin Shamsuddin to the official assignee. However the letter of undertaking was undated and it appears that it was received by the official assignee's office on 17 November 2008 that is, even before the letter of the official assignee setting out the conditions dated 4 December 2008 was issued! Thus, the validity of the letter of undertaking itself is questionable.

(ii) The bankrupt was to furnish the guarantee bond (bon jaminan)

(a) According to the letter of conditional approval dated 4 December 2008, the guarantor was required to furnish a guarantee bond and to deposit the sum of RM3,000 as security with the official assignee.

(b) It is doubtful as to who the actual guarantor is. On the one hand the letter of undertaking was given by Ahmad Sakhee bin Shamsuddin who should also be the guarantor, while on the other the name of one Kamarulaizian binti Kamsah appears on p. 1 of the bon jaminan with an undertaking to pay the deposit sum of RM3,000, with yet the name of Ahmad Sakhee bin Shamsuddin appearing on p. 2 (See encl. 89 - exh. RO3). No explanation has been given by the official

assignee as to why the name of Ahmad Sakhee bin Shamsuddin does not appear on p. 1 of the Bon Jaminan. If it was the official assignee's intention to have two guarantors, then the space for the sum required on p. 2 should not have been left blank.

(c) It is also to be noted that there are three signatures on p. 2 of the Bon Jaminan. As the signatures have not been identified it is unknown who the signatories are. Without the proper execution of the Bon Jaminan, the bond will not be enforceable.

(d) Importantly, the Bon Jaminan was only signed and dated 2 March 2009 that is, almost three months after the sanction had been given on 23 December 2008. The delay in the provision of the Bon Jaminan is in clear breach of para. 4 of the conditional letter of approval dated 4 December 2008 which clearly stipulated that the bankrupt had to comply with the conditions within 21 days from the date of the letter, failing which the sanction would not be given.

(iii) The guarantor was to deposit RM3,000 as security for costs

There is no evidence on record to show whether the said deposit had in fact been paid by the guarantor to the official assignee and if so, when it was paid.

[15] In view of the bankrupt's failure to comply fully with the conditions stipulated by the official assignee, it is clear that the official assignee should not have granted the sanction to the bankrupt as the interest of the applicants have not been safeguarded.

[16] The various complaints on the shortcomings have not been refuted by the official assignee on affidavit and hence following the principle expounded by Gopal Sri Ram JCA (as he then was) in the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609, the official assignee is deemed to have admitted the allegations made by the applicants.

[17] In the final analysis, the official assignee's decision to grant the sanction must be on an informed basis and not made purely as an administrative decision. The official assignee has failed to show to the applicants that the estate of the bankrupt will have the funds to meet the costs of the D3 suit which has been pending for the last 21 years. There is no basis for the official assignee to say there was no risk that the estate of the bankrupt could not pay the costs.

Accordingly, the official assignee's appeal was dismissed with costs.